88-1463

No. _____

Supreme Court, U.S.
FILED
MAR 4 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT

OF THE UNITED STATES

October Term, 1989

THOMAS W. WRENN, *Petitioner,*

-vs.-

STATE INDUSTRIAL INSURANCE SYSTEM, an Agency of THE STATE OF NEVADA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEVADA

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QUESTIONS PRESENTED

1. Is a totally disabled workman who is compelled to litigate his claim for worker's compensation benefits denied equal protection when his award does not include interest on delayed payments of his awarded benefits?

2. Is equal protection denied a totally disabled workman when he is required to pay his own attorney's fees under a statutory scheme which is intended to provide him with an attorney free of charge?

LIST OF PARTIES

The parties to the proceedings below were the petitioner, Thomas W. Wrenn and the Respondent, State Industrial Insurance System, an Agency of The State of Nevada.

The respondents this Court include State Industrial Insurance System, an Agency of the State of Nevada.

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IN THE SUPREME COURT

OF THE UNITED STATES

October Term, 1989

THOMAS W. WRENN, *Petitioner*,

-vs.-

STATE INDUSTRIAL INSURANCE SYSTEM, an Agency of THE STATE OF NEVADA, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEVADA

The petitioner Thomas W. Wrenn, through counsel, respectfully prays that a writ of certiorari issue to review the Judgment of the Supreme Court of the State of Nevada in the case of State Industrial Insurance System, an agency of the State of Nevada, Appellant v. Thomas Wrenn, Respondent, Case No. 18763, 104 Nev. ___ ,762 P.2d 884 (1988) entered

on the 24th day of October, 1988. (Order denying Rehearing was entered on December 6, 1988.)

OPINIONS BELOW

The District Court of the Eighth Judicial District Court for Clark County, Nevada, Department I reviewed the determination by an Appeals Officer under the Administrative Procedure Act of the State of Nevada and entered a Judgment in favor of Petitioner, Thomas W. Wrenn awarding him interest on delayed compensation payments from the time those payments became due until paid and further awarded Mr. Wrenn his actual attorney's fees. This Judgment was entered on December 15, 1987 and is part of the Appendix hereto (Appendix Pages 10-39.)

The evidentiary hearing on Mr. Wrenn's administrative claim was held before an Appeals Officer under the Administrative Procedure Act and the Appeals Officer's

Decision was entered on July 15, 1986 and is part of the Appendix hereto (Appendix Pages 15-29.)

As part of the Decision, the Appeals Officer included a prior Decision of the Eighth Judicial District Court of Clark County Nevada in Case No. A 218104 which was entered on June 1, 1983 and is part of the Appendix Hereto (Appendix Pages 30-33.) The Appeals Officer also included a prior Order Dismissing Appeal of the Nevada State Supreme Court in Case No. 14997 which was entered on March 11, 1983 and is part of the Appendix hereto (Appendix Pages 34-37.)

The Opinion of the Supreme Court of Nevada is reported at 104 Nev. ____, 762 P.2d 884 (1988) and further was assigned Case No. 18763 by the Supreme Court of the State of Nevada and is part of the Appendix hereto (Appendix Pages 1-9.)

A timely motion for rehearing to the Supreme Court of Nevada was denied on December 6, 1988, without opinion by Order Denying Rehearing, which is part of the Appendix hereto (Appendix Pages 40-41.)

JURISDICTION

The Supreme Court of the State of Nevada reversed the judgment of the District Court of Clark County, Nevada on October 24, 1988, and denied Motion for Rehearing on December 6, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1257(3).

NEVADA STATUTES INVOLVED

NRS 616.2537 provides as follows:

> "1. The state industrial claimant's attorney shall, when appointed by an appeals officer, represent without charge a claimant before the appeals officer or the district court.
>
> 2. When representing a claimant, the state industrial claimants' attorneys shall:
>
> (a) Advise the claimant and present his case to the appeals

officer; and

> (b) Present in the district court an appeal from the decision of the appeals officer if, in the opinion of the state industrial claimants' attorney, the appeal is merited."

NRS 99.040 provides in pertinent part as follows:

> "1. When there is no express contract in writing fixing a different rate of interest, interest must be allowed. . . .:
>
> (c) Upon money received to the use and benefit of another and detained without his consent.
>
> (d) Upon wages or salary, if it is unpaid when due, after demand therefor has been made."

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment XIV states in pertinent part:

> ". . . nor shall any State. . .deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

Shortly after July 3, 1978, Petitioner Wrenn commenced administrative

proceedings to obtain his correct workmen's compensation benefits. After prolonged administrative proceedings, the District Court entered a Decision on June 1, 1983 in Wrenn's favor (Appendix Pages 30-33) and the appeal of the State Industrial Insurance System (the administrative agency, hereinafter referred to as "SIIS") was dismissed by the Nevada Supreme Court on March 11, 1985 (Appendix Pages 34-37).

After the Order Dismissing Appeal was entered on March 11, 1985, Petitioner Wrenn then filed an administrative claim to enforce payment of benefits awarded in conformity with the District Court decision in his favor and for an award of accrued interest on the delayed benefits together with attorney's fees. In this regard, a Decision was entered by an Appeals Officer on July 15, 1986 (Appendix Pages 15-29) awarding Wrenn interest on delayed payments but denying his claim for

attorney's fees. The Decision was appealed by both Petitioner Wrenn and Respondent SIIS to the District Court, Clark County, Nevada and in the Judgment entered on December 15, 1987 (Appendix Pages 10-39), Wrenn was awarded both his attorney's fees and interest on delayed payment of benefits compensation and his attorney's fees.

SIIS appealed to the Nevada Supreme Court on January 13, 1988. During the appeal time and after Wrenn had filed his brief, the Nevada Supreme Court issued a decision in Weaver v. SIIS, 104 Nev. ___, 756 P.2d 1195 (1988) determining that a claimant was not entitled to receive interest on delayed compensation. Prior to the decision in Weaver, the Nevada Supreme Court had not acted upon either of the questions raised by Wrenn and there was no reason to believe that the Supreme Court would enter the decision that it did and therefore the constitutional

issue was not raised at the Appeals Officer level, the Trial Court, or in the proceedings before the Nevada Supreme Court.

Petitioner, Wrenn addressed the constitutional issue in his Petition for Rehearing for the reason that this was the first time that the constitutional issue could reasonably be addressed under the issues of the case. During the course of the oral argument, and in the decision of the Nevada Supreme Court it is apparent that they were concerned with the fundamental unfairness of their interpretation of the statute, however, they believed the deficiency should be corrected in the legislature.[1]

The Supreme Court did not address the specifics of the constitutional issue.

---

[1] Legislation is presently pending before the Nevada Legislature (A.B. 103 and A.B. 104) which may remedy Mr. Wrenn's grievances.

REASONS FOR GRANTING THE WRIT

I.

The Failure to Award Interest On Delayed Payments of Awarded Benefits Results In a Direct Reduction of Benefits to Any Injured Worker

Mr. Wrenn commenced an action to correct his benefits in 1978 and did not receive those corrected benefits until 1986. The effect of a delay of this magnitude has an obvious substantial impact on the benefits that Mr. Wrenn received.

In workmen's compensation matters, it has long been accepted that interest on delayed compensation payments is the only way to make the worker whole. Strachan Shipping Company v. Wedemeyer, 452 F.2d 1225 at p. 1229 (1971) stated as follows:

> "The rationale was well expressed by then Circuit Judge Burger, as follows:
>
> 'In the evolution of the law of remedies some things

> are bound to happen for the 'first time.' As a supplement to existing remedies long approved we cannot say that the allowance of interest is other than a factor which effectuates the polices of the Act for it is plainly in the direction of making the employee whole. Virginia Electric & Power Co. v. National Labor Relations Board, 319 U.S. 533, 540-541, 63 S.Ct. 1214, 87 L.Ed. 1568 (1943). We cannot regard changes in remedial mechanisms as beyond the Board's powers so long as they reasonably effectuate the congressional policies underlying the statutory scheme. National Labor Relations Board v. Seven-Up Bottling Co., supra [344 U.S. 344 (1954)]."
>
> International Brotherhood of Operative Potters v. N. L. R. B., 1963, 116 U.S. App. D.C., 34,320 F.2d 757, 761."

Twenty-seven states have legislation allowing interest on delayed compensation, Land & Marine Rental Co. v. Rawls, 686 P.2d 1187 at p. 1192 (Alaska, 1984) and eight states have held interest applicable to compensation awards. Land & Marine Rental Co. v. Rawls, 686 P.2d 1187 (Alaska 1984);

Parker v. Brinson Construction Co., 78 So.2d 873 (Fla. 1955); Chicago & Interurban Traction Co. v. Industrial Board of Illinois, 118 N.E. 464 (Ill., 1917); Goodnite v. Farm Equipment Co., 106 So. 2d 383 (Miss., 1958); Hanson v. North Dakota Workmen's Compensation Bureau, 248 N.W. 680 (No. Dak., 1933); Campbell v. Walsh-Kaiser Co., 81 A.2d 684 (R.I., 1951); Norman v. American Woolen Co., 84 A.2d 125 (Vt., 1951); and Tisdel v. Industrial Com'n of Arizona, 751 P.2d 527 (Ariz., 1988).

II.

Equal Protection Requires Payment of Interest on Delayed Benefits for Totally Disabled Workers

Califano v. Goldfarb, 430 U.S. 199, 97 S.Ct. 1021 (1977) which concerned gender-based distinction between widows and widowers with regard to Social Security benefits indicated that social security

payments are entitled to equal protection.

Califano v. Goldfarb, 430 U.S. 199 at 212, 97 S.Ct. at 1029, stated in part as follows:

> Therefore, *Wiesenfeld*, supra at 646-649, 95 S.Ct. at 232, expressly rejected the argument of appellant's predecessor, relying on *Flemming v. Nestor*, that the 'non-contractual' interest of a covered employee in future social security benefits precluded any claim of denial of equal protection. Rather, *Wiesenfeld* held that the fact that the interest is 'noncontractual' does not mean that 'a covered employee has no right whatever to be treated equally with other employees as regards the benefits which flow from his other employment,' nor does it 'sanction differential protection for covered employees which is solely gender based.' 420 U.S., at 646, 95 S.Ct. at 1232. On the contrary, benefits directly related to years worked and amount earned by a covered employee, and not to the need of the beneficiaries directly,' like the employment-related benefits in *Frontiero*, 'must be distributed according to classifications which do not without sufficient justification differentiate among covered employees solely on the basis of sex.' 420 U.S., at 647, 95 S.Ct. at 1233."

Equal protection precludes discrimination against that class of injured

workers, the totally and permanently disabled, who are compelled to litigate their benefit claims and who thereby, because of substantial delays (11 years in the instant case) are denied the interest on those delayed benefits payments. Those claimants denied disability benefits and who are thereby forced to litigate in order to recover those benefits are, the class who needs the protection of the Fourteenth Amendment.

III.

Equal Protection is Denied an Indigent Workman When he is Refused the Free Services of a Statutorily Mandated State Appointed and Paid Attorney

NRS 616.2537 provides for the appointment of the State Industrial Claimant's Attorney for an Injured Workman without charge. The Appeals Officer who heard this matter determined that Mr. Wrenn was entitled to be represented by the State

Industrial Claimant's Attorney. (Appendix Page No. 24, Finding 21)

The District Court who reviewed the Appeals Officer's Decision saw the obvious inequities in depriving a totally disabled workman of representation and awarded Mr. Wrenn his actual attorney's fees.

Under NRS 616.2537, Mr. Wrenn was entitled to representation free of charge. Under the Nevada Supreme Court's interpretation, he is required to pay for his own representation. Out of necessity, the only way he can pay for his representation is out of the benefits he will receive if successful. This results in a substantial reduction of the actual benefits that the statutes intended Mr. Wrenn to have. The statutes as construed by the Nevada Supreme Court thereby invidiously discriminate against the handicapped and indigent workmen who are compelled to litigate to receive their benefits and unlike that

class of workmen who are afforded the free services of the State Industrial Claimant's Attorney must compensate their counsel out of their award.

Califano v. Goldfarb, supra, which has been cited above, precludes this denial of equal protection.

CONCLUSION

The eleven year delay in payment of benefits and the failure to award attorney's fees resulted in Mr. Wrenn's actual workmen's compensation benefits being reduced to approximately twenty percent of what they should have been. The statutory construction of Nevada's industrial insurance benefits by the Nevada Supreme Court patently violates equal protection as it invidiously discriminates against a totally disabled and indigent workman and encourages delayed payments, prolonged litigation, denial of adequate

representation and substantially reduces the actual benefits that the workmen receives.

For these various reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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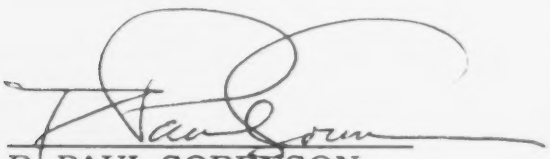

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APPENDIX

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Opinion

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Findings of Fact, Conclusions of Law and Judgment

Case Nos. A 250176 and A250187 filed December 15, 1987 in the District Court, Clark County Nevada 10-39

Exhibit "1"

Findings of Fact, Conclusions of Law and Decision, Claim No. 61-23385, Appeal No. LV6131 filed July 15, 1986 before the Appeals Officer 15-29

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IN THE SUPREME COURT OF THE STATE OF NEVADA

Filed October 24, 1988

No. 18763

STATE INDUSTRIAL INSURANCE SYSTEM, an Agency of the State of Nevada,

Appellant,

vs.

THOMAS W. WRENN,

Respondent.

Appeal from order awarding interest and attorney's fees. Eighth Judicial District, Clark County; J. Charles Thompson, Judge.

Reversed.

Pamela Bugge, General Counsel, Carson City; Douglas T. Quon, Associate General Counsel, Las Vegas, for Appellant.

R. Paul Sorenson,
Las Vegas,
for Respondent.

OPINION

PER CURIAM:

Respondent Thomas Wrenn suffered an industrial injury to his left eye in 1961, and an additional injury to the eye in 1978, resulting in total disability of the eye. Appellant SIIS (then NIC), classified this injury as an outgrowth of the initial injury and allowed Wrenn Compensation for complete loss of the eye based on the rate in effect in 1961, rather that in 1978. Wrenn appealed that determination, and the State Industrial Claimants' Attorney was appointed to represent him. See NRS 616.2535 and 616.2537. After the appeals officer affirmed SIIS's decision, the State Industrial Claimants' Attorney declined any further representation of Wrenn because, in his opinion, no appeal to

the district court was merited. See NRS 616.2537(2)(b). Wrenn then retained private counsel and pursued a successful petition for judicial review in the district court. This court subsequently affirmed the district court's decision that the 1978 injury to Wrenn's eye was separate and unrelated to the 1961 injury and should be compensated at the rate in effect in 1978. See SIIS v. Wrenn, Order Dismissing Appeal, Supreme Court Docket No. 14997 (filed March 11, 1985).

Following this court's decision, Wrenn filed a claim for, among other things, attorney's fees incurred in pursuing the appeals and interest on the delayed payment of benefits. Wrenn's claim was denied in full. On appeal, the appeals officer determined that Wrenn was entitled to interest on the award of benefits, but denied him attorney's fees. Both Wrenn and the SIIS petitioned the district court for review of this decision. The district

court consolidated the actions, and, concluding that Wrenn was entitled to both interest and attorney's fees, affirmed the award of interest and reversed the denial of attorney's fees. SIIS now appeals the district court's order. For the reasons expressed below, we conclude that Wrenn is not entitled to recover either interest or attorney's fees.

SIIS first contends that the district court erroneously awarded Wrenn interest on the delayed payment of his worker's compensation benefits. Specifically, SIIS argues that the Nevada Industrial Insurance Act (NRS Ch. 616) includes no provision for such an award. This court recently decided the identical issue in Weaver v. SIIS, 104 Nev. __, 756 P.2d 1195 (1988). Although Wrenn implicitly concedes that Weaver bars the recovery of interest on the delayed payment of compensation benefits, he urges this court to follow Imperial Palace v. Dawson, 102 Nev. 88, 715 P.2d 1318 (1986),

and award him interest as a sanction against the SIIS for the delay in payment. Because the record on appeal does not reveal that the delay in payment of worker's compensation benefits was due to any arbitrary conduct or bad faith practice of the SIIS, we conclude that sanctions are not warranted. We also reject Wrenn's alternative argument that if interest is not awarded, the SIIS should compensate him for his injury at the rate in effect at the time of payment to eliminate the inequities resulting from delayed payment. NRS 616.625 states that the amount of compensation must be determined as of the date of injury, unless otherwise provided by specific statute. No statute provides for compensation at the rate Wrenn suggests. Therefore, NRS 616.625 establishes compensation as of the date of injury, i.e., 1978.

SIIS next contends that the district court erroneously granted Wrenn attorney's

fees because the Nevada Industrial Insurance Act contains no express provision for the allowance of attorney's fees, with two exceptions inapplicable to this case. See NRS 616.544 and 616.647. SIIS also argues that, pursuant to State Indus. Ins. System v. Snapp, 100 Nev. 290, 680 P.2d 590 (1984), attorney's fees are not recoverable under NRS 18.010 in worker's compensation cases. Wrenn, on the other hand, argues that he did not voluntarily retain private counsel to represent him, but was deprived of representation under NRS 616.2535 and 616.2537, and that Snapp therefore is inapplicable. Wrenn contends that when the State Industrial Claimants' Attorney is appointed to represent a claimant, and then declines to represent the claimant on appeal from an adverse agency decision, the claimant is entitled to attorney's fees if he successfully appeals with the assistance of privately retained counsel. Because the State Industrial

Claimants' Attorney erroneously determined that no appeal of the agency decision to compensate Wrenn at the 1961 rate was merited, Wrenn argues that he is entitled to legal representation without charge under the Nevada Industrial Insurance Act.

NRS 616.2535 and NRS 616.2537 do not mandate the appointment of the State Industrial Claimants' Attorney to represent all claimants free of charge in proceedings before either the appeals officer or the district court. Under NRS 626.2535, the appeals officer must appoint the State Industrial Claimants' Attorney to represent a claimant when the "appeals officer finds that the claimant would be better served by legal representation in his case." Further, once appointed, the State Industrial Claimants' Attorney is obligated to represent the claimant at the district court level only "if, in the opinion of the state industrial claimants' attorney, the appeal is

merited." See NRS 616.2537(2)(b). Further, the legislature has not expressly included in the legislative scheme. See, e.g., Weaver, 104 Nev. at ___, 756 P.2d at 1195; Goldstine v. Jensen Pre-Cast, 102 Nev. 630, 729 P.2d 1355 (1986). As in Snapp, we decline to allow a claimant recovery of attorney's fees in a worker's compensation claim absent express statutory authorization.

In light of our disposition of this appeal, we need not consider appellant's

remaining contention. We reverse the order of the district court.[1]

/s/ Young , A.C.J.
Young

/s/ Steffen, , J.
Steffen

/s/ Springer , J.
Springer

/s/ Mowbray , J
Mowbray

DISTRICT COURT

[1]The Honorable E.M. Gunderson, Chief Justice, did not participate in the decision of this appeal.

DISTRICT COURT

CLARK COUNTY, NEVADA

Filed December 15, 1987

Case Nos. A 250176 and A 250187

(consolidated)

THOMAS W. WRENN, Petitioner, vs. STATE INDUSTRIAL INSURANCE SYSTEM, an Agency of the State of Nevada, Respondent.	)

STATE INDUSTRIAL INSURANCE SYSTEM, an Agency of the State of Nevada, Petitioner, vs. THOMAS W. WRENN, Respondent.	)

FINDINGS OF FACT, CONCLUSIONS OF LAW

AND JUDGMENT

Date of Hearing: 12-14-87

Time of Hearing: 9:00 A.M.

This matter having come on for hearing on the 14th day of December, 1987, upon the Petition for Judicial Review filed by THOMAS W. WRENN in Case No. A 250176 and the Petition for Judicial Review filed by the STATE INDUSTRIAL INSURANCE SYSTEM in Case No. A 250187, which cases were consolidated by an Order entered by this Court on December 2, 1986, and the Court having considered the pleadings and papers filed by the respective parties and other good cause appearing therefor, the Court finds as follows:

FINDINGS OF FACT

1. The Findings of Fact entered by the Appeals Officer on July 15, 1986 are not disputed and are therefore adopted by this Court in total. A copy of said Findings of Fact are attached hereto as Exhibit "1".

CONCLUSIONS OF LAW

That based upon the foregoing Findings of Fact, the Court concludes as follows:

1. That THOMAS W. WRENN is entitled to interest pursuant to NRS 99.040(3) and (4) on all delayed payments of compensation from the time they became due until paid at the lawful rate of interest in effect.

2. That THOMAS W. WRENN is entitled to recover his attorney's fees for the reason that he was entitled to have the State Industrial Claimant's Attorney represent him without charge under NRS 616.253. That he was deprived of such representation through no fault of his own and a claimant should be entitled to attorney's fees when he undertakes an action which has been turned down by the State Industrial Claimant's Attorney and is successful with the assistance of privately retained counsel.

JUDGMENT

Based upon the foregoing Findings of Fact and Conclusions of Law,

IT IS HEREBY ORDERED as follows:

1. That the Decision of the Appeals Officer entered on July 15, 1986 awarding Claimant, THOMAS W. WRENN, interest on compensation from the date it became due until paid at the lawful rate, is affirmed.

2. That the Decision of the Appeals Officer entered on July 15, 1986 denying Claimant, THOMAS W. WRENN's request for attorney's fees is hereby reversed and the Court hereby enters judgment in favor of THOMAS W. WRENN and against the STATE INDUSTRIAL INSURANCE SYSTEM for Mr. Wrenn's actual attorney's fees he incurred after being refused representation by the State Industrial Claimant's Attorney.

3. That execution of this Court's judgment is hereby stayed pending appeal of this matter by the State Industrial Insurance

System to the Supreme Court of the State of Nevada or until further Order of this Court.

DATED this 15 day of December, 1987.

/s/ J. Charles Thompson
DISTRICT JUDGE

BY: /s/ R. Paul Sorenson
R. PAUL SORENSON
Attorney for THOMAS W. WRENN
323 Las Vegas Blvd. South
Las Vegas, Nevada 89101

EXHIBIT "1"

BEFORE THE APPEALS OFFICER

Filed July 15, 1986

Claim Number 61-23385

Appeal Number LV6131

In the Matter of the Contested Industrial Insurance Claim	)
of	)
THOMAS W. WRENN,	)
Claimant.	)

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FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION

Introduction

This matter having come on for hearing pursuant to notice of hearing scheduling this matter for September 4, 1985, and the matter having been continued to October 28, 1985, and at that time the claimant, Thomas W. Wrenn having personally appeared with his attorney, R. Paul Sorenson, and the State Industrial Insurance System being represented by Michael P. Golden, Associate General Counsel, and the Court having heard testimony, considered evidence submitted in support of the respective claims and good cause appearing, the Appeals Officer herein enters his Findings of Fact, Conclusions of Law and Decision:

FINDINGS OF FACT

1. Claimant, THOMAS W. WRENN sustained a compensable injury on June 24, 1961.

2. That on or about July 3, 1978, Claimant dislocated the intraocular lens which had been implanted as part of the medical treatment of the occupational injury received on June 24, 1961.

3. That the injury sustained on July 3, 1978 was accepted by the State Industrial Insurance System as an outgrowth of the original injury in 1961.

4. That on June 1, 1983, the Honorable Michael J. Wendell, District Judge of the Eighth Judicial District Court entered a Decision and Order that Thomas W. Wrenn was entitled to be compensated for his eye injury when it ". . .occurred in 1978 and petitioner is entitled to benefits based upon the then existing rates." A copy of that Decision and

Order is attached hereto as Exhibit "A" and by reference made a part hereof.

5. That the State Industrial Insurance System appealed that Decision and Order to the Supreme Court of the State of Nevada.

6. That the Supreme Court of the State of Nevada dismissed the appeal of the State Industrial Insurance System on March 11, 1985. In that Order they concluded that " . . . the District Court properly ordered payment of benefits at the 1978 rates." A copy of that Order Dismissing Appeal is attached hereto as Exhibit "B" and by reference made a part hereof.

7. That THOMAS W. WRENN then requested the State Industrial Insurance System to compensate him in accordance with the Decision of Judge Wendell.

8. That THOMAS W. WRENN then filed a claim with the State Industrial Insurance System claiming that he was entitled to

compensation from July 3, 1978 to the present; that he was entitled to interest from the time the monies became due until actually received and in addition he was entitled to attorney's fees and further to the right to elect to receive his permanent partial disability award in a lump sum.

9. That the State Industrial Insurance System did not contest his right to receive compensation during this period of time, however, disputed the wage base he utilized in computing the amount due and they further disputed his right to interest, attorney's fees and the lump sum payment of his permanent disability award.

10. That at all times from July 3, 1978 through March 10, 1982 Claimant, THOMAS W. WRENN was totally disabled from a work related injury and entitled to receive compensation for Temporary Total Disability.

11. That at all times from March 10, 1982 to June 30, 1986, Claimant, THOMAS W. WRENN is entitled to receive compensation as part of the rehabilitative maintenance program ordered on February 20, 1985 (Appeal No. 4765), and affirmed by the Honorable Joseph Pavlikowski, District Judge, Eighth Judicial District Court on November 12, 1985 in Case No. A 237562.

12. That the Court specifically finds on the issue of "wage base" as follows:

A. That at the time Claimant, THOMAS W. WRENN was injured in 1961, his earnings were in excess of the maximum wage and therefore, he was entitled to maximum benefits at that time.

B. That THOMAS W. WRENN had returned to employment prior to July 3, 1978 and from January 1, 1977 to July 3, 1978, his actual monthly

wages were $1,495.86, while working. That the maximum monthly wage for purpose of computing workmen's compensation benefits was $1,377.08.

C. That during the year and a half immediately preceding July 3, 1978, the Claimant, THOMAS W. WRENN was off of work for part of the time due to problems with his eyes, which was related to the prior work injury. That the State Industrial Insurance System calculated the claimant's compensation benefits utilizing a method which averaged the claimant's disability time when he earned nothing and received no compensation from the State Industrial Insurance System, with his time worked, thereby reducing his average earnings beneath the maximum and the State Industrial Insurance System further claimed that the Order

of the Supreme Court of the State of Nevada and the Decision of Judge Wendell should be interpreted to reflect that the maximum average monthly wage to be utilized in calculating benefits should be that which was effective from July 1, 1977 to June 30, 1978.

13. That the claimant herein was entitled to receive his compensation benefits on a biweekly basis from July 3, 1978 to the present date.

14. That Claimant, THOMAS W. WRENN is entitled to interest at the legal rate on all deficiencies in payment of compensation from July 3, 1978 until paid.

15. That on March 10, 1982, the Claimant was determined to be permanently partially disabled to the extent of twenty-four (24%) percent of the whole body.

16. That the State Industrial Insurance System paid Mr. Wrenn utilizing, first, the maximum wage base in effect in 1961, then, the new wage base as they calculated it for 1978, and in addition thereto, determined that he was not permitted to elect to receive this permanent partial disability in a lump sum.

17. That Claimant, THOMAS W. WRENN refused all payments tendered to him concerning permanent partial disability insisting on his right to make that election to receive the same in a lump sum.

18. That Claimant, THOMAS W. WRENN had appointed for him the State Industrial Attorney to prosecute his claims in the issues referred to and ultimately determined in his favor by Judge Wendell and the Supreme Court of the State of Nevada.

19. That on May 31, 1978, the State Industrial Attorney refused to continue representing Claimant, THOMAS W. WRENN,

forcing him to obtain private counsel to pursue the continuation of those claims.

20. That Mr. Wrenn did obtain private counsel to prosecute his claims further and entered into a fee agreement which provided to his attorney a sum of money equal to one-third of his recovery in excess of the $3,000.00 settlement offer made to him by the System prior to entering into that agreement.

21. That THOMAS W. WRENN had a bona fide claim to pursue against the State Industrial Insurance System and its predecessor, the Nevada Industrial Commission and was entitled to have the State Industrial Attorney represent him without charge.

CONCLUSIONS OF LAW

That based upon the foregoing Findings of Fact, the Appeals Officer concludes as follows:

1. That Claimant, THOMAS W. WRENN is entitled to have his compensation benefits paid to him utilizing the maximum wage base in effect as of the date of the subsequent injury, July 3, 1978, which is the sum of $1,377.08. NRS 616.027(1).

2. That Claimant, THOMAS W. WRENN is entitled to interest on compensation benefits from the date they became due until paid at the legal rate of interest of twelve (12%) percent per annum. NRS 99.040.

3. That Claimant, THOMAS W. WRENN is entitled to elect to receive his award of permanent partial disability, which determination was made on March 10, 1982, in a lump sum (NRS 616.607) plus interest of twelve (12%) percent per annum from the date the payment became due until paid.

4. That although THOMAS W. WRENN was entitled to legal representation in prosecuting his claim without charge, and that

although THOMAS W. WRENN incurred legal fees to the extent of one-third of his recovery in exceeds of $3,000.00, that there is no authority under Nevada law to permit the award of attorney's fees to Claimant.

DECISION

Based upon the foregoing Findings of Fact and Conclusions of Law, it is hereby ordered:

1. That Claimant is entitled to have all of his back total temporary disability and rehabilitation compensation re-calculated commencing on July 3, 1978 and continuing to June 30, 1986, utilizing the maximum wage base in effect on July 3, 1978, which is the sum of $1,377.08 per month.

2. That Claimant is entitled to interest on all back temporary total disability and rehabilitation compensation from July 3, 1978 to June 30, 1986 calculated at the rate of twelve (12%) percent per annum from the

date the payments became due until the same are paid.

3. That Claimant is entitled to elect to receive his award of permanent partial disability in the amount of twenty-four (24%) percent in a lump sum, which is payable as of the date of its determination on March 10, 1982, and further is entitled to interest thereon at the rate of twelve (12%) percent per annum from the date the same became due until paid.

4. That the State Industrial Insurance System is further directed to prepare calculations showing the amount that is due to the Claimant under this Decision along with the date it became due and further showing all payments made to the Claimant and the date they were paid as to temporary total disability and rehabilitation maintenance compensation, as well as calculation of amount due for Permanent Partial Disability, including the

calculation of interest at twelve (12%) percent per annum, and submit the same within five days of the date of this Decision to the Appeals Officer and to counsel for the claimant, R. Paul Sorenson, for his approval or objection, which approval or objection shall be presented to the Appeals Officer and the General Counsel of the State Industrial Insurance System within three days of the receipt of said calculation.

5. That Claimant's request for attorney's fees is hereby denied.

NOTICE

Pursuant to NRS 233.130, should any party desire to appeal this final determination of the Appeals Officer, a Petition for Judicial Review must be filed with the District Court within thirty (30) days after service by mail of

this decision.

DATED this 15 day of June, 1986.

APPEALS OFFICER

/s/ Jay W. Brewer
JAY W. BREWER, ESQ.

BY: /s/ R. Paul Sorenson
R. PAUL SORENSON
Attorney for Claimant
323 Las Vegas Blvd. South
Las Vegas, Nevada 89101

EXHIBIT "A"

IN THE EIGHTH JUDICIAL DISTRICT COURT

OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF CLARK

Filed June 1, 1983

Case No. A-218104

THOMAS W. WRENN,

Petitioner,

vs.

STATE INDUSTRIAL INSURANCE SYSTEM, an agency of the State of Nevada,

Respondent.

DECISION AND ORDER

This is a judicial review of an appeals officer's ruling relating to two claims filed by the Petitioner. The first claim relates to the loss of the left eye. The second claim relates to the development of psoriasis. The ruling of each claim was adverse to the Petitioner.

The facts are not disputed. As to the first claim, the Petitioner suffered an injury to the left eye while on the job in 1961. The industrial claim was accepted and Petitioner received a 27-1/2% disability of the eye and was given a lump sum award of $1,100.

In February of 1975, the Petitioner developed a cataract in the left eye and sought to reopen the claim with the NIC. The claim was accepted. Surgery was performed May 5, 1975, as a recognized industrial claim. Without detailing all the medical problems, ultimately the Petitioner suffered a complete loss of the eye in 1978. This resulted from the surgically implanted lens becoming dislocated. The loss of the eye occurred from the surgical removal of the lens.

In 1982 the NIC awarded him compensation for the complete loss of the eye in the amount of $4,000 less the $1,100 originally awarded. The award was based on

the compensation rate fixed in 1961 when the initial injury occurred. The 1978 rates are considerably higher than the 1961 rates.

As to the second claim, the Petitioner was denied any relief by the Commission for the skin disorder which he claims resulted from stress due to the eye problem.

The Hearing Officer construed NRS 616.625 to fix the compensation for the loss of the eye under the rate that applied in 1961 when the left eye was injured.

We disagree. The loss of the eye in 1978 resulted from a separate, unrelated accident. The compensable injury occurred in 1978 and Petitioner is entitled to benefits based upon the then existing rates. The decision of the Hearing Officer is reversed.

On the second issue, namely the psoriasis, a review of the record indicates that there is a basis in fact to support the Appeals Officer's determination upholding the denial of

the claim. This Court cannot substitute its judgment for the Appeal Officer's judgment. The Court affirms that determination.

IT IS SO ORDERED.

Dated this 1st day of June, 1983.

/s/ Michael J. Wendell
DISTRICT JUDGE

EXHIBIT "B"

IN THE SUPREME COURT OF THE STATE OF NEVADA

Filed March 11, 1985

No. 14997

STATE INDUSTRIAL INSURANCE SYSTEM,	)
Appellant,	)
vs.	)
THOMAS W. WRENN,	)
Respondent.	)

ORDER DISMISSING APPEAL

This is an appeal from an order of the district court reversing a decision of the appeals officer of the Department of Administration. Respondent suffered an industrial injury to his eye in 1961, for which he received worker's compensation benefits. In 1978, respondent had further problems with his eye. and the SIIS awarded him additional compensation at the statutory rates

in effect in 1961. Respondent pursued an administrative appeal, but the appeals officer affirmed the award. Thereafter, respondent petitioned the district court for judicial review. The district court reversed the decision of the appeals officer and held that the compensation awarded should have been calculated at the statutory rates in effect in 1978.

Appellant first contends that the district court erred by interpreting NRS 616.625 as providing for compensation at 1978 statutory rates, in effect at the time of respondent's latest claim, rather than at the 1961 rates in effect at the time respondent suffered the original industrial accident.[1] We disagree. Having reviewed the briefs and the record on appeal, and having heard the oral arguments of

---

1 [1] NRS 616.625 provides in pertinent part:

> **1**[T]he amount of compensation and benefits and the person or persons entitled thereto must be determined as of the date of the accident or injury to the employee, and their rights thereto become fixed as of that date.

counsel, we conclude that the district court properly ordered payment of benefits at the 1978 rates. We note that it has been a long-standing policy of this court to construe worker's compensation laws liberally in favor of the protection of the injured workers. See Hansen v. Harrah's, 100 Nev. 60, 675 P.2d 394 (1984).

Appellant also contends that the district court exceeded its permissible scope of review under the NRS 233B.140 by reversing the decision of the appeals officer. We have determined, however, that the district court reversed because of the appeals officer's error or law, and therefore, this contention is without merit. See NRS 233B.140(5).

There being no error on the part of the district court, we hereby

ORDER this appeal dismissed.[2]

/s/ Springer , C.J.
Springer

/s/ Mowbray , J.
Mowbray

/s/ Gunderson , J.
Gunderson

/s/ Steffen , J.
Steffen

/s/ Zenoff , Sr.J.[3]
Zenoff

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[2] Further, we hereby vacate our stay order of October 19, 1985.

[3] The Governor designated David Zenoff, Senior Justice to participate in this case pursuant to Nev. Const. art. 6 Sec. 4.

CERTIFICATE OF MAILING

The undersigned, an employee of the State of Nevada, Department of Administration Hearings Division, does hereby certify that on the date shown below a true and correct copy of the foregoing FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION, was duly mailed, postage fully prepaid, addressed to the following; and, further, that there is regular service by mail between the place of mailing and the places so addressed.

DATED this 16th day of July, 1986.

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/s/ Maria A. Cable

IN THE SUPREME COURT OF THE STATE OF NEVADA

Filed December 6, 1988

No. 18763

STATE INDUSTRIAL INSURANCE SYSTEM, an Agency of the State of Nevada,	)
Appellant,	)
vs.	)
THOMAS W. WRENN,	)
Respondent.	)

ORDER DENYING REHEARING

Rehearing denied. NRAP 40(c)

It is so ORDERED.[1]

/s/ Young , A.C.J.
Young

/s/ Steffen, , J.
Steffen

/s/ Springer , J.
Springer

/s/ Mowbray , J
Mowbray

[1] The Honorable E. M. Gunderson, Chief Justice, did not participate in the decision of this appeal.

Supreme Court, U.S.
FILED
APR 25 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1463

In The

Supreme Court of the United States

October Term, 1988

THOMAS W. WRENN,

Petitioner,

vs.

STATE INDUSTRIAL INSURANCE SYSTEM, an Agency of the STATE OF NEVADA,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of Nevada

RESPONDENT'S BRIEF IN OPPOSITION

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Counsel for Respondent

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QUESTIONS PRESENTED

1. Does the United States Supreme Court have jurisdiction to grant a Petition for a Writ of Certiorari where the petitioner raised the federal questions for the first time in a Petition for Rehearing of the state court's decision and the state court did not address or consider the question?

2. Does the decision of the Nevada Supreme Court present a sufficiently substantial and important federal question to warrant granting a Petition of a Writ of Certiorari?

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No. 88-1463

In The

Supreme Court of the United States

October Term, 1988

THOMAS W. WRENN,

Petitioner,

vs.

STATE INDUSTRIAL INSURANCE SYSTEM, an Agency of the STATE OF NEVADA,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of Nevada

RESPONDENT'S BRIEF IN OPPOSITION

Respondents hereby submit this brief in opposition to the Petition for a Writ of Certiorari.

JURISDICTION

Respondents respectfully submit that the jurisdictional requirements of 28 U.S.C. §1257(3) have not been satisfied by petitioner, and for that reason this Court should decline jurisdiction of this case.

RELEVANT CONSTITUTIONAL PROVISIONS AND STATUTES

28 U.S.C. §1257(3)

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> . . .
>
> (3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

Supreme Court Rule 17.1

> .1. A review on writ of certiorari is not a matter of right, but a judicial discretion, and will be granted only when there are special and important reasons therefore. . . .

Supreme Court Rule 21.1(h)

> (h) If review of the judgment of a state court is sought, the statement of the case shall also specify the stage in the proceedings, both in the court of first instance and in the appellate court, at which the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed upon by the court; such pertinent quotation of specific portions of the record, or summary thereof, with specific reference to the places in the record where the matter appears (e.g., ruling on exception, portion of court's charge and exception thereto, assignment of errors) as will show that the federal question was timely and properly raised so as to give this Court jurisdiction to review the judgment on writ of certiorari.

NRAP[1] *28(a)(2) and 28(b)*

(a) Brief of the Appellant. The brief of the appellant shall contain under appropriate headings and in the order here indicated: . . .

(2) A statement of the issues presented for review.

. . .

(b) *Brief of the respondent.* The brief of the respondent shall conform to the requirements of subdivision (a)(1)-(4), except that a statement of the issues or of the case need not be made unless the respondent is dissatisfied with the statement of the appellant.

NRAP 40(c)(1)

(c) Scope of Application; When rehearing Considered.

(1) . . . no point may be raised for the first time on rehearing.

Nevada Revised Statutes

NRS 616.2535.

Appointment to represent certain claimants; Request; inquiry by appeals officer; appointment.

1. Any claimant may request the appointment of the state industrial attorney to represent him. The request must be made in writing.

2. The appeals officer shall consider each request within a reasonable time and shall make any inquiry as he deems necessary. If the appeals officer finds that the claimant would be better served by legal representation in his case, the appeals officer shall appoint the state industrial claimants' attorney to represent him. (1977, p.886; 1983, p.478; 1985, p.667.)

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[1] "NRAP" is an abbreviation for the Nevada Rules of Appellate Procedure.

NRS 616.2537 provides in relevant part:

1. The state industrial claimant's attorney shall, when appointed by an appeals officer, represent without charge a claimant before the appeals officer or the district court.

2. When representing a claimant, the state industrial claimants' attorneys shall:

(a) Advise the claimant and present his case to the appeals officer; and

(b) Present in the district court an appeal from the decision of the appeals officer if, in the opinion of the state industrial claimants' attorney, the appeal is merited.

NRS 99.040 provides in relevant part:

1. When there is no express contract in writing fixing a different rate of interest, interest must be allowed. . . . :

(c) Upon money received to the use and benefit of another and detained without his consent.

(d) Upon wages or salary, if it is unpaid when due, after demand therefore has been made.

STATEMENT OF THE CASE

The Petitioner, Thomas W. Wrenn, suffered an industrial injury to his left eye in 1961 which was accepted by the then Nevada Industrial Commission (hereinafter NIC).[2] The Petitioner suffered a subsequent injury to the left eye in 1978. The Petitioner filed an appeal of the NIC

[2] Now known as the State Industrial Insurance System (SIIS), the respondent.

determination which affixed compensation benefits as of the date of the original injury (1961). The State Industrial Claimants' Attorney was appointed to represent him.

On May 25, 1979, the Appeals Officer issued an order which aggrieved the Petitioner. The State Industrial Claimants' Attorney, John Godfrey, by written correspondence dated May 31, 1979 advised the Petitioner that under his statutory discretion, he felt that an appeal to the Eighth Judicial District Court of Nevada was not merited and declined to proceed further with the appeal.[3] The Petitioner retained private counsel and appealed to District Court and in Case No. A 218104 the Eighth Judicial District Court of Nevada reversed the Appeals Officer's decision of May 25, 1979. That matter was then appealed to the Nevada Supreme Court by the State Industrial Insurance System. The Supreme Court dismissed the appeal on March 11, 1985 thereby ruling in favor of the Petitioner.

The Petitioner later filed an appeal of the determination of the State Industrial Insurance System to deny an award of attorney's fees and interest on the compensation benefits due the Petitioner. On July 15, 1986, the Appeals Officer entered its Order granting the Petitioner prejudgment interest on the compensation benefits and denying the award of attorney's fees.

On August 14, 1986, Petitioner filed a Petition for Judicial Review before the Eighth Judicial District Court of Nevada in Case No. A 250176, appealing that portion

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[3] The State Industrial Claimants' Attorney has no connection to respondent.

of the Appeals Officer's decision which denied the award of attorney's fees. On that date, the State Industrial Insurance System filed its petition for Judicial Review appealing that portion of the decision which granted an award of interest on the compensation benefits. The State Industrial Insurance System filed a Motion for Consolidation on December 2, 1986, and an Order was entered by the District Court consolidating these two appeals.

After briefing the issue, on December 15, 1987, the District Court entered its Order affirming the Appeals Officer's decision with respect to the award of interest and reversing the Appeals Officer on the award of attorney's fees. On January 13, 1988, the respondent State Industrial Insurance System filed an appeal to the Nevada Supreme Court. The matter was fully briefed and oral argument conducted on October 12, 1988.

On October 24, 1988, the Nevada Supreme Court ruled that the Petitioner was not entitled to an award of interest nor attorney's fee on a workman's compensation claim because the Nevada legislature had never authorized such awards. The Nevada Supreme Court held that the creation of additional benefits was best left to the legislature.

On November 8, 1988, the Petitioner filed a Petition for Rehearing before the Nevada Supreme Court and for the very first time raised a federal question, one of violation of the Equal Protection provisions of the United States Constitution. On December 6, 1988, the Nevada Supreme Court denied the Petition for Rehearing without opinion, citing NRAP 40(c) which provides in part that "no point may be raised for the first time on rehearing."

STAGE AT WHICH THE FEDERAL QUESTIONS WERE RAISED

As detailed in Respondent's Statement of the Case and the argument which follows, petitioner did nothing to specially set up or claim his alleged federal constitutional rights until the Petition for Rehearing to the Nevada Supreme Court.

ARGUMENT

I.

The Supreme Court does not have jurisdiction to review a state court decision where the federal questions were raised by the petitioner for the first time in a petition for rehearing of the state court's decision and when the state court never addressed or considered the purported federal questions.

It is a long settled rule that the jurisdiction of the United States Supreme Court to reexamine the final judgment of a state court can arise only if the record as a whole shows either expressly or by clear implication that the federal claim was adequately presented in the state system. *Webb v. Webb*, 451 U.S. 493, 496 (1981). Because this case presents a petition for a writ of certiorari to a state court, the relevant jurisdictional statute is 28 U.S.C. §1257. As applied to the circumstances of this case, that statute requires that in the state courts petitioner has "specially set up or claimed under the constitution . . . of . . . the United States" those rights which he now seeks to have this Court enforce. 28 U.S.C. §1257(3). *Webb v. Webb*, 451 U.S. 493, 495 (1981).

Supreme Court, Rule 21.1(h) requires a petitioner to "specify the stage in the proceedings, both in the court of the first instance and in the appellate court, at which the federal questions sought to be reviewed were raised: *the method or manner of raising them* and the way in which they were passed upon by the court." (Emphasis added.)

In the Petitioner's jurisdictional statement, the Petitioner admits that he raised the federal questions in this case for the first time in his petition for rehearing before the Nevada Supreme Court. The Petitioner argues, "[that] prior to the decision in *Weaver v. SIIS*, 104 Nev. ___, 756 P.2d 1195 (1988), the Nevada Supreme Court had not acted upon either of the questions raised by Wrenn, and there was no reason to believe the [Nevada] Supreme Court would enter the decision that it did and therefore *the constitutional issue was not raised at the Appeals Officer level, the Trial Court [District Court, appellate review], or in the proceedings before the Nevada Supreme Court.*" (Page 7, 8 of Petition for Writ of Certiorari) (Emphasis added) Petitioner failed to satisfy the jurisdictional requirement that federal questions be specifically set up or claimed. It was incumbent upon petitioner to affirmatively argue the possible constitutional issues in the case at the appeals officer and district court levels in addition to the Nevada Supreme Court. In other words, at all stages when the question as to the purported violation of the Equal Protection was at issue, petitioner was required to inform the court of the federal questions he now seeks to raise.

With the exception of the within petition and the Petition for Rehearing of the Nevada Supreme Court's decision, petitioner never mentioned that his claim had raised federal constitutional questions.

In deciding whether a federal question has been "specifically set up or claimed" within the meaning of 28 U.S.C. §1257(3), it is relevant and usually sufficient to ask whether the petitioner satisfied the state rules governing presentation of the issues. *See, e.g., Beck v. Washington*, 369 U.S. 541, 549-554 (1962), *Food Employees v. Valley Plaza*, 391 U.S. 308, 334-335 (1968) (Harlan, J., dissenting).

As is manifest from the opinion rendered by the Nevada Supreme Court, the state court never considered the case on the question of constitutional violations. This Court has frequently stated that when "the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts unless the aggrieved party in this Court *affirmatively* show the contrary." (Emphasis added) *Webb v. Webb*, 451 U.S. 493, 495, quoting *Street v. New York*, 394 U.S. 576, 582 (1969). Failure to present the federal question in conformance with the state procedure constitutes adequate and independent grounds of decision barring review in the United States Supreme Court, so long as the state has a legitimate interest in enforcing its procedural rules. *Michigan v. Tyler*, 436 U.S. 499, 512, n.7 (1978); *Stembridge v. Georgia*, 343 U.S. 541, 547 (1952).

It is clear in this case that petitioner has failed to follow well-established procedural requirements in presenting his purported federal questions to the Nevada Supreme Court. Federal questions which the highest state is, by its settled practice, justified in disregarding, either because not assigned or because not noticed or relied upon in the brief or argument of counsel, will not serve as the basis of a writ of error from the federal Supreme

Court. *Beck v. Washington, supra; Hulbert v. Chicago,* 202 U.S. 275, 281 (1906).

It is settled under Nevada law that constitutional issues not raised or passed upon by the trial court will seldom be considered by the Nevada Supreme Court on appeal. *Munoz v. State, ex rel. Dep't of Hwys.*, 92 New. 441, 444, 552 P.2d 42, 43-44 (1976), citing *Tennessee v. Dunlap,* 426 U.S. 312 (1976). Rule 28(a)(2) and Rule 28(b) of the Nevada Rules of Appellate Procedure required Petitioner to set forth in his answering brief a statement of the issues presented for review, if dissatisfied with the statement of issues presented by the Petitioner.[4] Unless there has been clear error, the Nevada Supreme Court will not consider questions which have not been raised in the briefs or in oral argument. *Wittenberg v. Wittenberg,* 56 Nev. 42, 455-456, 55 P.2d 619, 624 (1936); *Walker v. Burkham,* 67 Nev. 541, 577, 222 P.2d 205, 223 (1950).

Moreover, it is established by rule in Nevada that "no point may be raised for the first time on rehearing." NRAP 40(c)(1). *Powell v. N.C. & O.Ry,* 28 Nev. 305, 82 P. 96 (1905); *State v. Ceja,* 53 Nev. 281, 2 P.2d 124 (1931); *In re Lorring,* 75 Nev. 330, 335, 340 P.2d 589 (1959); *Stanfill v. State,* 99 Nev. 499, 665 P.2d 1146 (1983). This Court has recognized the reasonableness of Nevada procedural rules in the past. *N.-C.-O. Ry. v. Burris,* 38 Nev. 156, 145 P. 926 (1914), *aff'd* 224 U.S. 103 (1917). (Refusal of trial court

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[4] A copy of the issues presented for review in respondent's answering brief to the Nevada Supreme Court is included herein as Appendix A. No constitutional issue was raised.

to allow leave to amend answer at trial in order to assert a federal question).

It has been repeatedly emphasized by this Court that it is too late to raise a federal question for the first time in a petition for rehearing, after the final judgment of the state court of last resort.

> [I]t is elementary that a mere assertion in a state court of a right under the Constitution of the United States in a petition for rehearing affords no ground for invoking the jurisdiction of this court unless the court below in dealing with the petition for rehearing considers and passes on the federal ground therein relied upon. . . .

Bowe v. Scott, 233 U.S. 658, 663 (1914); *see also Radio Station WOW v. Johnson*, 326 U.S. 120, 128 (1945).

The Nevada Supreme Court denied the Petition for Rehearing using the following language: "Rehearing denied. NRAP 40(c). It is so ORDERED." The citation to NRAP 40(c) (quoted in part above) indicates that the Petition was denied on procedural grounds. A cursory denial of a petition for rehearing does not constitute a decision on the merits as to the federal questions raised in the petition. *Consol. Turnpike Co. v. Norfolk & O.V. Ry. Co.*, 228 U.S. 326, 333-334 (1913); *Forbes v. State Council of Virginia*, 216 U.S. 396, 398-399 (1910).

Petitioner cannot claim that he was surprised by the Nevada Supreme Court's decision, as the Nevada Supreme Court decided the issue of interest on worker's compensation benefits in the previously decided case of *Weaver v. SIIS* on June 28, 1988, *supra*. The Petitioner requested an opportunity to supplement his brief after

Weaver v. SIIS, supra, was decided and before oral argument in this case. The SIIS filed no opposition and Petitioner filed his supplemental brief. The supplemental brief did not raise a constitutional argument and later, at oral argument the Petitioner never raised the purported federal question.

In the same vein, the Nevada Supreme Court had previously decided the issue of attorney's fees in *State Industrial Insurance System v. Snapp,* 100 Nev. 290, 680 P.2d 590 (1984). Therefore, the Petitioner cannot claim he was surprised by the Nevada Supreme Court's decision in this case and cannot raise the issue on rehearing. *Herndon v. Georgia,* 295 U.S. 441 (1934).

Jurisdictional requirements that federal constitutional issues must be presented to and decided by the highest state court is not formal, but is rather grounded upon policy.

> [T]here are powerful policy considerations underlying the statutory requirement and our own rule that the federal challenge to a state statute or other official act be presented first to the state courts. These considerations strongly indicate that we should apply this general principle with sufficient rigor to make reasonably certain that we entertain cases from state courts only where the record clearly shows that the federal issue has been properly raised below.

Webb v. Webb, 451 U.S. 493, 499 (1981). These policy considerations include comity, development of the record, identification of adequate and independent state grounds, and judicial economy. *Id.* at 499-501. These considerations indicate that this instant petition must be denied for lack of jurisdiction.

II.

The constitutional questions raised by the petitioner are not sufficiently substantial or important to warrant certiorari.

The U.S. Supreme Court has clearly stated that, "A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefore." Supreme Court Rule 17.1

The instant case concerns a decision of the Nevada Supreme Court in which an award of interest and attorney's fees to a workmen's compensation claimant was denied. The Petitioner argues that the decision violates the mandates of the Equal Protection clause of the United States Constitution. It is clear that the issues and decision involved in the case at bar were based upon an adequate and independent nonfederal question on state grounds.

The Petitioner argues that, "the statutes [NRS 616.2537 and NRS 99.040] as construed by the Nevada Supreme Court thereby invidiously discriminate against the handicapped and indigent workmen who are compelled to litigate to receive their benefits and unlike the class of workmen who are afforded the free services of the State Industrial Claimant's Attorney must compensate their counsel out of their award." A careful review of the two Nevada statutes under review reveals that neither denies benefits to anyone, but in fact both *create* benefits to certain members of a class.

NRS 616.2537 provides for the appointment of the State Industrial Claimants' Attorney, paid for by the state, to an injured worker for the purpose of an administrative

law hearing before the Appeals Officer without charge to the worker. NRS 616.2537 further provides that the State Industrial Claimants' Attorney shall represent the claimant in District Court "if, in the opinion of the state industrial claimants' attorney, the appeal is merited." In the case at bar, the State Industrial Claimants' Attorney did not believe his clients case to be meritorious and exercised his statutory discretion in declining to represent the claimant in District Court. The Nevada Supreme Court held that "NRS 616.2537 does not mandate the appointment of . . . [an] [a]ttorney to represent all claims free of charge in proceedings before either the appeals officer or the district court." The court further held that, "the [Nevada] legislature had not authorized an award of attorney's fees in worker's compensation cases except in limited circumstances not applicable here." The Petitioner requests that this Court create an entitlement to benefits which the Nevada Supreme Court refused to create in deference to the state legislature. It is obvious that the requested entitlement is a purely "local" issue with no federal consequences, which should be and has been resolved by the highest state court.

It is interesting to note that NRS 99.040 does not specifically deny benefits but in fact confers them. NRS 99.040(c) and (d) provides for the award of interest on *contracts* either express or implied by law upon unpaid wages or money detained without consent. The Nevada Supreme Court held that NRS 99.040 is unapplicable in a case involving worker's compensation benefits. *Weaver v. SIIS, supra. SIIS v. Wrenn,* 104 Nev. ___, 762 P.2d 884 (1988). The Petitioner again suggests that this court confer upon him a benefit which the Nevada Supreme Court

has refused to grant in deference to the law-making branch of government. It is respectfully submitted that the issue of an award of interest in worker's compensation cases is purely local and does not present a substantial federal question for this Court.

The Petitioner has failed to sufficiently establish a substantial federal issue. The Petitioner argues that the decision of the Nevada Supreme Court denies him equal protection of the law. It is clear that the decision of the Nevada Supreme Court was simply an application of Nevada law to the particular facts of the case. There was no classification by the Court as the decision merely affects Petitioner's right to certain benefits. The Petitioner has failed to identify a discrete class subject to the equal protection clauses.

The Petitioner inaccurately suggests that injured workers fall into the category of "indigents", but neglects to apprise this court that NRS 616.2535 provides court appointed attorneys to injured worker *without regard to financial need*. NRS 616.2535 provides the appointment of the State Industrial Claimants' Attorney if the Appeals officer finds that the claimant would be better served by legal representation. The appointments are made without inquiring of the claimant's financial need. The classification of indigency has never been held by the Court to be a suspect class and the Petitioner has failed to identify a fundamental interest. *See James v. Valtierra*, 402 U.S. 137 (1971); *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973), *Maher v. Roe*, 432 U.S. 464 (1977). For the sake of argument, and if this Court finds a discrete class, the standard of review should be one of

determining whether there is a rational basis for the statutes.

The legitimate purpose served by the Nevada Supreme Court's decision is clear: the role of the Courts is to interpret law and the role of making law is best served by the legislature. The Nevada Supreme Court has consistently denied requests for remedies when the Nevada legislature choose not to expressly confer them. *Goldstine v. Jensen Pre-Cast*, 102 Nev. 630, 729 P.2d 1355 (1986); *Weaver v. SIIS, supra.* The rational basis for not creating these benefits is a fiscal one. The legislature fiscal notes provided to the Nevada Supreme Court indicated that the legislature reviewed the cost of awarding attorney's fees in workers' compensation cases and specifically rejected such a scheme as too financially burdensome.

Under a "rational basis" test, the Court will not attempt to decide on the wisdom and utility of the purported arbitrary classification, and it is clear that states need not "strike at all evils at the same time or in the same way." *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456 (1981). The Nevada Supreme Court must be left to deal with each case on an individual basis on purely local nonfederal questions as those presented at bar.

For the foregoing reasons, it is respectfully submitted that the federal questions presented in this petition are both inapplicable and not sufficiently important or substantial to warrant the granting of the Writ of Certiorari.

CONCLUSION

For the reasons set forth above, the Petition for Writ of Certiorari should be denied.

Respectfully submitted the 26th day of April, 1989.

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APPENDIX A

Introductory Comments

Respondent, THOMAS W. WRENN (hereinafter referred to as "WRENN"), on February 17, 1988, filed a Motion to Dismiss and an accompanying Respondent's Appendix Re: Motion to Dismiss. This was accomplished prior to the docketing of the record on appeal. Therefore, herein, when WRENN refers to an reference in its Respondent's Appendix, he will identify it as "Resp. App.", and will also give the corresponding Record on Appeal "ROA" page numbers.

Appellant, STATE INDUSTRIAL INSURANCE SYSTEM, an Agency of the State of Nevada, will be hereinafter referred to as "SIIS."

STATEMENT OF ISSUES

1. Are workmen's compensation claimants entitled to receive interest on unpaid compensation from the time it should have been paid until it is received under the authority of NRS 99.040?

2. Is a claimant entitled to recover his attorney's fees when he was deprived or representation under NRS 616.253?

STATEMENT OF THE CASE

On July 15, 1986, Appeals Officer Brewer issued Findings of Fact, Conclusions of Law and Decision (Resp. App. pp. 1-14, ROA, Vol. II, pp. 6-29). This decision addressed several issues, which are as follows:

1. Claimant was found to be entitled to have all his back total disability and rehabilitation compensation recalculated, beginning July 3, 1978 and continuing to June 30, 1986, using maximum wage base in effect on July 3, 1978.

2. Claimant was found to be entitled to interest on all back temporary total disability and rehabilitation compensation from July 3, 1978 to June 30, 1986, calculated at rate to twelve percent per annum from date they became due until they were paid.

No. 88-1463

Supreme Court, U.S.
FILED
MAY 10 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT

OF THE UNITED STATES

October Term, 1989

THOMAS W. WRENN, *Petitioner,*

-vs.-

STATE INDUSTRIAL INSURANCE SYSTEM, an Agency of THE STATE OF NEVADA, *Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEVADA

PETITIONER'S REPLY MEMORANDUM

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No. 88-1463

IN THE SUPREME COURT

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October Term, 1989

THOMAS W. WRENN, *Petitioner*,

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STATE INDUSTRIAL INSURANCE SYSTEM, an Agency of THE STATE OF NEVADA, *Respondent*.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEVADA

PETITIONER'S REPLY MEMORANDUM

QUESTIONS ADDRESSED IN RESPONDENT'S BRIEF IN OPPOSITION

Respondent addressed the following issues relative to its Brief in Opposition to Petition for Writ of Certiorari:

1. Whether or not the United States Supreme Court has jurisdiction.

2. Whether the decision of the Nevada Supreme Court raises a substantial and important question.

ARGUMENT

I. This Court Has Jurisdiction to Entertain This Petition Even Though the Federal Issue Was Not Directly Raised Until the Petition for Rehearing

The reason that equal protection was not directly raised until the petition for rehearing is that it was the first and probably only chance to present the matter to the Nevada Supreme Court. Brinkerhoff-Faris Trust Company v. Hill, 281 U.S. 673, 677, 678 (1930).

The State Court's decision was a surprise and could not have been reasonably anticipated from prior decisions. Herndon v. Georgia, 295 U.S. 441 (1935).

The fact that the Nevada Supreme Court denied the Petition for Rehearing without reference to the federal question will not

prevent this Court from exercising its jurisdiction. Great Northern R. Co. v. Sunburst Oil & Refining Co., 287 U.S. 358, 366-67 (1932); Ohio ex rel. Bryant v. Akron Park District, 281 U.S. 74, 79 (1930); Missouri ex rel. Missouri Ins. Co. v. Gehner, 281 U.S. 313, 320 (1930); Saunders v. Shaw, 244 U.S. 317, 320 (1917) and Cole v. Arkansas, 333 U.S. 196, 200 (1948).

The entire thrust of Petitioner Wrenn's argument to the Nevada Supreme Court concerned the fundamental unfairness of any interpretation of the statutes which would deny Wrenn interest on past due benefits or deny Wrenn his attorney's fees when he had been deprived of free representation.

Those arguments of fundamental unfairness were addressed by the Court in briefs and oral argument and their Decision ignores the issue of fundamental unfairness which was their duty to address and correct.

The Respondent cites Weaver v. SIIS, 104 Nev. ___, 756 P.2d 1195 (1988) decided after all customary briefing was complete, and criticizes the Petitioner for failing to thrust the constitutional argument at the Nevada Supreme Court during a supplemental brief. Petitioner filed a supplemental brief attempting to show the difference between the facts of the Weaver case. The basic differences were that the Petitioner had been successful in his claim for interest at all stages of the proceedings and the delay in paying his benefits was substantially longer than Weaver. In addition, in Weaver, there was the argument that the Claimant was negligent in failing to request payment of benefits that had been awarded.

Respondent SIIS cited SIIS v. Snapp, 100 Nev. 290, 680 P.2d 590 (1984) for the proposition that the Nevada Supreme Court had previously decided the issue of attorney's

fees. There was substantial difference between Petitioner Wrenn's case and the Snapp decision. Snapp was not claiming attorney's fees as a result of being deprived of representation by the State Industrial Claimant's Attorney as Wrenn was. Therefore, the decision was under a totally different statute.

The Nevada Supreme Court has always liberally construed the statutes in favor of the workmen's compensation claimant to fully compensate and not deny compensation. SIIS v. Buckley, 100 Nev. 376, 682 P.2d 1387 at 1390 (1984). Under prior statute, the Nevada Supreme Court permitted interest on worker's compensation cases. NIC v. Strange, 84 Nev. 153, 437 P.2d 873 (1968).

The jurisdictional requirements that Federal Constitutional issues be presented to the highest State Court has been met. The Nevada Supreme Court just elected to ignore

the fundamental unfairness issue. (Petitioner has included in a Supplemental Appendix herein, the Petition for Rehearing filed with the Nevada Supreme Court.)

II. Once Programs Such as Workmens Compensation are Introduced to Protect Individuals from Financial Consequences of Injury, It is Important that the Program Treat all the Participants Substantially Equal and Any Interpretation of Legislation Which Would Permit the Primary Financial Benefits of Litigants To Be Reduced by Eighty Percent Only Because of Cost of Litigation and its Delay is Invidious Discrimination

This is not a case that just affects Mr. Wrenn. It affects all persons who must litigate to receive a correct benefit. Mr. Wrenn is totally disabled and made indigent by failing to receive correct benefits. It took over eight years to finally arrive at a correct basic benefit. Interest on delayed benefits is a fundamental

right necessary to equalize delayed benefits with those that are paid timely.

The Nevada Supreme Court relied on a **split** decision of an intermediate Court of Appeals in Oregon. Haret v. SAIF, 72 Or. App. 668, 697 P.2d 201, 204 (1985), *review denied*, 299 Or. 313, 702 P.2d 1110 (1985). Other than Nevada and Oregon, Petitioner's review reveals no other state when the issue was raised, failing to grant interest on delayed benefit payments.

Invidious discrimination has been defined as arbitrary, irrational, and not reasonably related to a legitimate purpose. See Kirk v. Board of County Com'rs, Muskogee County, Okl., 595 P.2d 1334, 1336 (1979) and Local No. 1 (ACA) Etc. v. I.B.T.,C.,W. & H., 419 F.Supp. 263, 277 (D.C. Pa., 1976).

The Nevada Supreme Court when

addressing the problem in SIIS v. Wrenn, 104 Nev. ___, 762 P.2d 884, 886 (1988) stated:

> "We have repeatedly refused to imply provisions not expressly included in the legislative scheme."

The Nevada Supreme Court overlooks the fact that Wrenn's request is to only make him **equal** with other claimants, not to be granted some additional benefit. The Nevada Supreme Court and SIIS treated Wrenn's request for interest and attorney's fees as a request for a new, substantive right and in this regard, their logic is flawed.

SIIS and the Court is permitting the interest earned off of these delayed benefits to be used by SIIS for other purposes. This is also true about their failure to pay for his attorney. What is particularly offensive about the Nevada Supreme Court's interpretation is that it is sending a message to SIIS that they can utilize claimants' benefits for other

purposes unless bad faith can be shown. [No reported cases.] What is even more egregious is that claimants when faced with this type of interpretation will be forced into unreasonable settlements and abandonment of their rights.

The interest earned on Wrenn's delayed benefits is equal to approximately seven years of benefit payments, almost enough to pay the entire back-payments that were due Mr. Wrenn.

CONCLUSION

For the reasons set forth in the Petition for Writ of Certiorari and the reasons set forth herein, Petitioner's Wrenn's Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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Counsel of Record
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May 7, 1989

PETITIONER'S

SUPPLEMENTAL

APPENDIX

IN THE SUPREME COURT OF THE STATE OF NEVADA

Filed November 8, 1988

No. 18763

STATE INDUSTRIAL INSURANCE SYSTEM, an Agency of the State of Nevada,	)
Appellant,	)
vs.	)
THOMAS W. WRENN,	)
Respondent.	)

PETITION FOR REHEARING

Preliminary Statement

COMES NOW, Respondent, THOMAS W. WRENN, and petitions for rehearing pursuant to Rule 40 of the Nevada Rules of Appellate Procedure and respectfully request this Court to reconsider its Opinion entered on October 24, 1988, in the above case.

This petition is based upon the grounds that this Court's Opinion overlooks the

mandate of the provisions of the Fifth and Fourteenth Amendments to the United States Constitution in that a recipient of workmen's compensation benefits is entitled to have his benefits equal to the benefits payable to all other recipients of workmen's compensation. The Trial Court had determined that Respondent WRENN was entitled to interest on unpaid workmen's compensation benefits from the time they became due until paid and further reimbursed for attorney's fees for representation he was deprived of under a specific statute.

Argument

Mr. Wrenn engaged in litigation that extended over many years to collect workmen's compensation benefits he believed he was entitled to. During the course of that litigation, it was determined that he was entitled to representation without charge. However, the State Industrial Claimant's

Attorney withdrew from that representation without just cause and Mr. Wrenn was compelled to hire private counsel to successfully conclude his litigation.

Mr. Wrenn believed the only way that he could be treated equally to all other claimants for workmen's compensation in Nevada was for him to receive interest at the legal rate from the time his payments became due until the same were paid and further that he should be reimbursed for his actual attorney's fees. The Trial Court found authority for awarding interest in the general statutes of Nevada and authority for the payment of attorney's fees under the workmen's compensation statutes themselves.

This Court's Opinion herein discriminates against a claimant who must litigate to achieve his benefits and as such is a violation of the due process and equal

protection clauses of the Fifth and Fourteenth Amendment of the United States Constitution.

In this particular case, this Court singled out litigants in rendering its Opinion and has reduced the amount of benefits that Mr. Wrenn received substantially by depriving him of interest for the period where his benefits were not paid and the amount of money he had to pay for attorney's fees. This results in making his award substantially less than a claimant that received his benefits without the need of substantial and lengthy litigation.

There is no dispute that the Nevada legislature intended to make the benefits from workmen's compensation equal for all parties. There is certainly nothing in the legislation which would indicate that there was an intent that a person who is required to contest his claim should receive less than the

claimant who receives his benefits without any difficulty.

In fact the legislature and the Administrative Hearing's Officer determined that Mr. Wrenn was entitled to an attorney without charge and this right was only lost because the State Industrial Claimant's Attorney erroneously elected not to pursue an appeal. In addition, the State controlled agency administering the workmen's compensation laws, earned interest on all of the benefits that it was required to pay Mr. Wrenn from the time they became due until paid. The effect of the Opinion herein is that the State Industrial Insurance System profits from the delay in paying Mr. Wrenn's benefits and Mr. Wrenn suffers. What is a relatively small income for the system as a whole is a large expense to be borne by Mr. Wrenn alone.

When determining benefits due to a claimant, discrimination between litigants

and non-litigants has the same effect as discrimination between the sexes. Therefore, Califano v. Goldfarb, 430 U.S. 199, 97 S.Ct. 1021 (1977) which concerned gender-based distinction between widows and widowers with regard to Social Security benefits has applicability here. Califano v. Goldfarb, 430 U.S. 199 at 212, 97 S.Ct. at 1029, stated in part as follows:

> "Therefore, *Wiesenfeld*, supra at 646-649, 95 S.Ct. at 1232, expressly rejected the argument of appellant's predecessor, relying on *Flemming v. Nestor*, that the 'non-contractual' interest of a covered employee in future social security benefits precluded any claim of denial of equal protection. Rather, *Wiesenfeld* held that the fact that the interest is 'noncontractual' does not mean that 'a covered employee has no right whatever to be treated equally with other employees as regards the benefits which flow from his or her employment,' nor does it 'sanction differential protection for covered employees which is solely gender based.' 420 U.S., at 646, 95 S.Ct. at 1232. On the contrary, benefits 'directly related to years worked and amount earned by a covered employee, and not to the need of the beneficiaries directly,'

like the the employment-related benefits in *Frontiero*, 'must be distributed according to classifications which do not without sufficient justification t differentiate among covered employees solely on the basis of sex.' 420 U.S., at 647, 95 S.Ct. at 1233."

CONCLUSION

For the reasons stated above, Respondent respectfully requests that this Court's Opinion issued on October 24, 1988 be reconsidered, and the Trial Court's decision affirmed.

Respectfully submitted,

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Attorney for Respondent

CERTIFICATE OF MAILING

The undersigned certifies that she is an employee of R. PAUL SORENSON and on this 7th day of November, 1988, she deposited for mailing, postage prepaid, at Las Vegas, Nevada, a true copy of the Petition for Rehearing addressed to:

Douglas T. Quon
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STATE INDUSTRIAL INSURANCE SYSTEM
Post Office Box 26929
Las Vegas, Nevada 89126-0929

/s/ Sarah S. Higgins
An Employee of
R. PAUL SORENSON